

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMRO IMADTALIB ZAK,

Defendant-Appellant.

UNPUBLISHED
December 6, 2011

No. 298441
Oakland Circuit Court
LC No. 2008-223588-FH

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of his motion to set aside his guilty plea. Defendant was convicted, by guilty plea, of possession of a controlled substance, MCL 333.7403(2)(b)(ii), and possession of marihuana, MCL 333.7403(2)(d). He was sentenced to two years probation on each count. We remand to the trial court for further proceedings as set forth below.

Defendant is a 21-year old citizen of Jordan and during the trial court proceedings was residing with his family in the United States. After pleading guilty as charged in the instant matter, defendant was placed on probation pursuant to MCL 333.7411. Defendant violated his probation on two occasions and, on each occasion, plead guilty to the violations. His plea on the second violation led to the revocation of his probation. At some point after he entered his guilty plea to the original charges, deportation proceedings were initiated against defendant. On May 5, 2010, defendant moved to set aside his plea of guilty to the original charges based upon his counsel's failure to advise him that his plea could subject him to deportation proceedings. According to defendant, the recent decision of *Padilla v Kentucky*, ___ US ___, 130 S Ct 1473; 176 L Ed 2d 284 (2010), in which the United States Supreme Court held that a defense counsel's failure to advise his client that his guilty plea made him subject to automatic deportation amounted to ineffective assistance of counsel, was retroactively applicable to defendant's case. As such, defendant argued he must be allowed to withdraw his plea. The trial court denied defendant's motion, for reasons discussed below. This Court granted leave to appeal the trial court's decision.

We review the trial court's decision concerning a motion to withdraw a guilty plea for an abuse of discretion. *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006). The

retroactivity of a court's ruling presents an issue of law that this Court reviews de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008).

On appeal, defendant contends that the trial court abused its discretion in denying his motion to set aside his guilty plea where counsel failed to advise him of the immigration consequences of his plea. Defendant specifically argues that counsel's failure to advise him on this issue rendered him ineffective, as indicated in *Padilla v Kentucky*, and that the retroactive application of *Padilla* requires that he be allowed to withdraw his guilty plea.

The trial court explained the basis of its ruling by referring to pages four and five of the prosecutor's brief in response to defendant's motion. As factual support for the prosecution's argument to the trial court, the prosecutor's brief recited information that was purportedly obtained in a conversation with defendant's original attorney, Mr. Chiappelli. Thus, the trial court resolved defendant's motion, which was properly supported by an affidavit, by discrediting that affidavit in favor of unsupported factual assertions made in a brief. Counsel's representations of fact in a brief, however, are not a substitute for evidence. At a minimum, before resolving a factual issue such as what advice Chiappelli provided before defendant entered his plea, the trial court should have held an evidentiary hearing. Its failure to do so, and instead its reliance on unsupported factual assertions as a basis for denying the motion, was an abuse of discretion. We therefore remand this matter to the trial court for an evidentiary/*Ginther*¹ hearing to determine whether trial counsel did, in fact, provide any advice to defendant regarding the possible immigration consequences of a plea.

We note that neither the prosecutor nor the trial court addressed defendant's claim below that *Padilla* applied retroactively. The prosecutor instead proceeded under the assumption that retroactivity was a foregone conclusion, electing to challenge this issue for the first time on appeal. There has been, however, no authority in Michigan, as yet, resolving the matter of retroactivity. Thus, if the trial court determines at the conclusion of the evidentiary hearing that defense counsel did not provide advice to defendant regarding the possible immigration consequences of his plea, it must also determine whether *Padilla* is implicated.

Reversed and remanded. We retain jurisdiction and direct the trial court to conduct the evidentiary hearing, make all necessary determinations, and provide all transcripts and orders regarding the same to this Court within 91 days as set forth in the accompanying order.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Court of Appeals, State of Michigan

ORDER

People of MI v Amro Imadtalib Zak

Docket No. 298441

LC No. 2008-223588 FH

Deborah A. Servitto
Presiding Judge

Jane E. Markey

Kirsten Frank Kelly
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 21 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the trial court is to conduct an evidentiary hearing to determine whether trial counsel provided any advice to defendant regarding the possible immigration consequences of his plea. If the trial court determines at the conclusion of the evidentiary hearing that defense counsel did not provide advice to defendant regarding the possible immigration consequences of his plea, it must also determine whether *Padilla v Kentucky*, __ US __; 130 S CT 1473; 176 L Ed 2d 284 (2010) is implicated. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

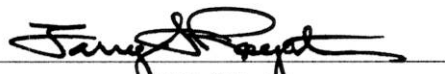
The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 06 2011

Date


Chief Clerk